United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7183

United States Court of Appeals

For the Second Circuit.

B
P/S

SAMUEL CHANEYFIELD,
Plaintiff-Appellant,

against

THE CITY OF NEW YORK and MATHEWS & CHASE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

(6098)

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

SAMUEL CHANEYFIELD,

Plaintiff-Appellant,

against

THE CITY OF NEW YORK and MATHEWS & CHASE,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

Date	Proceedings
1974	
Sept. 5	Filed complaint and issued summons.
Oct. 25	Filed deft's (Mathews & Chase) affirmation & notice of motion to dismiss, stay or to consolidate motions) Ret. 11-8-74.
Oct. 25	Filed deft's (Mathews & Chase) affdvt & notice of motion to dismiss (Rule 12[b]) Ret. 11-8-74.
Oct. 31	Filed summons and marshal's return. Served the following: Arthur P. Chase on 10-22-74 Albert A. Mathews on 10-6-74 City of New York on 9-11-74

Relevant Docket Entries

Nov. 1 Filed Deft. Mathews & Chase Notice of Motion & affirmation to dismiss complaint. ret. 11/8/74.

1975

Feb. 20 Filed pltff's affdvt in opposition to motion to dismiss.

Feb. 20 Filed pltff's memorandum of law in opposition to motion to dismiss.

Feb. 19 Filed deft's (City of N. Y.) Answer & Cross-Complaint.

Feb. 24 Filed defts (Matthews & Chase) memorandum of law in reply to pltff's memorandum of law in opposition to the motion to dismiss.

Feb. 25 Filed memo endorsed on motion to dismiss filed 10-25-75—No federal jurisdiction motion to dismiss is granted. On our own motion pursuant to Rule 12(b)(3) FRCP the action is dismissed as to the City of N. Y. no subject matter jurisdiction—Owen, J. Mailed notices.

Feb. 27 Filed Judgment—Defts. have judgment against the pltff. dismissing the complaint.—Clerk. Mailed Notices.

Mar. 5 Filed copy of Judgment Entered 2-27-75.

Mar. 13 Filed pltff's notice of appeal from Judgment dismissing complaint. Mailed notice to Kroll Edelman Elser & Wilson and to J. Robt. Morris.

Notice of Motion to Dismiss Action.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL CHANEYFIELD,

v.

THE CITY OF NEW YORK and MATHEWS & CHASE.

74 CIV. 3845 (RO)

Please Take Notice that upon the annexed affidavit of Marshal S. Endick, duly sworn to on October 23, 1974 and the affidavit of A. A. Mathews, duly sworn to on September 24, 1974, and the affidavit of Sidney Prival duly sworn to on October 23, 1974, and upon the Summons & Complaint and the annexed exhibits and memorandum of law submitted herewith, on the 8th day of November 1974, at 2:15 in the afternoon, or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant Mathews & Chase, will move before Judge Richard Owen sitting at a Motion Term of the United States District Court for the Southern District of New York, at the United States Courthouse, Foley Square, New York, N. Y. Courtroom 10 for the following relief:

(1) An order dismissing the within action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction and a cause of action is not stated inasmuch as the alleged claim does not arise under the Federal Metal and Non-Metallic Mine Safety Act, 30, U.S.C. §721 *et seq.*

(2) An order pursuant to Rule 12(b) of the Federal Rules of the Civil Procedure quashing the return of service of the Summons on the moving defendant which service was purportedly made on September 10, 1974 upon Sidney Prival, because the purported service was made on a person not empowered to receive service of process on behalf of that defendant.

(3) In the event the court denies the aforementioned relief and only in that event, an order dismissing the within action or, alternatively, staying the action on the ground that another action involving the same issues is presently pending in the Supreme Court of the State of New York, County of Bronx, and that said issues can be fully litigated in the New York State Court Action.

(4) Such other and further relief as to the court may seem just and proper.

Yours etc.,

KROLL, EDELMAN, ELSER & WILSON
Office & P. O. Address
22 E. 40th Street
New York, New York 10016
(212) MU-6-2686

To:

Corcoran & Brady
Attorneys for Plaintiff
11 Park Place
New York, N. Y. 10007

The City of New York
Municipal Building
New York, N. Y. 10007

Affidavit of Marshal S. Endick in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

MARSHAL S. ENDICK, being duly sworn, upon oath deposes and says that:

1. He is a member of the Bar of this Court and is an attorney associated with Kroll, Edelman, Elser & Wilson, attorneys for the defendant Mathews & Chase and as such is fully familiar with all the facts and circumstances herein.

2. This affidavit is submitted in support of the Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and, in the alternative, in support of the Motion for an Order to dismiss or stay the within action on the grounds that another action involving identical issues is presently pending.

3. This action was commenced by the filing of the Summons & Complaint dated September 4, 1974 in the United States District Court for the Southern District of New York. A copy of the Summons & Complaint are annexed hereto as Exhibit A. Thereafter, a copy of the Summons & Complaint was purportedly served upon the defendant Mathews & Chase by delivering same to Sidney Prival on September 10, 1974. Thereafter, on or about October 6, 1974 a second purported service was made by delivery of a Summons to Mr. A. A. Mathews. This motion relates only to the purported service of September 10, 1974 upon Sidney Prival. The validity of the subsequent service upon Mr. Mathews will, if necessary, be challenged by a subsequent motion.

Affidavit of Marshal S. Endick in Support of Motion to Dismiss

4. The within action was instituted by the plaintiff, an injured workman, who allegedly was involved in an accident on September 13, 1971 during the construction of a sewer tunnel owned by the City of New York and located in the Borough of Manhattan. The defendant Mathews & Chase had been retained by the City of New York to act as consulting engineer and it is alleged as a result of the negligence of both Mathews & Chase and The City of New York, the plaintiff was damaged to the extent of $1,000,000. Jurisdiction of this Court has been claimed solely under the Federal Metal and Non-Metallic Mine Safety Act, Title 30, §721, U. S. C. *et seq.*

5. Prior to the commencement of the within action a Summons & Complaint was served upon Sidney Prival on August 7, 1974, instituting an action in the Supreme Court of the State of New York, County of Bronx, entitled: Samuel Chanevfield v. Moran Engineering Company, Mathews & Chase, Westlectric Castings Company, Banner Industries, Inc. The Fate-Root-Heath Division, The Card Corporation, The Metalloy Steel Foundry Co., Inc. The allegations and issues asserted in this State Court Action are identical to those contained in the within action. On August 27, 1974, a verified answer, Demand for a Verified Bill of Particulars, Demand Pursuant to CPLR §2103(e) and Notice To Take Deposition Upon Oral Examination were duly served upon the plaintiff's attorneys by counsel then representing the moving defendant. A copy of the Summons and Verified Complaint, Verified Answer, Demand for Verified Bill of Particulars, Demand Pursuant to CPLR §2103(e), Notice to Take Deposition Upon Oral Examination and Verified Bill of Particulars are annexed hereto and made part hereof as Exhibit "B".

6. Upon information and belief a copy of the New York State Action Summons & Complaint was also left at the residence of A. A. Mathews, one of the partners of the defendant Mathews & Chase, on September 10, 1974.

Affidavit of Marshal S. Endick in Support of Motion to Dismiss

7. Your deponent is informed that the defendant Mathews & Chase is a partnership having its principal place of business at 230 Park Avenue, New York, N. Y. This partnership is comprised of two non-resident partners, to wit: A. A. Mathews and A. P. Chase and was formed on September 24, 1969 and performed consulting engineer services for the City of New York on the North River Water Pollution Control Project in the Borough of Manhattan.

Lack of Jurisdiction Over the Subject Matter

8. The plaintiff claims jurisdiction of the court under the Federal Metal and Non-Metallic Mine Safety Act, Title 30, §721 U. S. C. *et seq.* As more fully set forth in the attached memorandum of law it is contended that the court is without subject matter jurisdiction of this action. The aforementioned statute was designed to promote safety in mines and creates an equitable remedy to be pursued by the Secretary of the Interior which is not involved in the case at Bar. Moreover, the defendant Mathews & Chase is not an operator within the definition as contained in that statute and the only remedy available for violations thereunder is for the Secretary of The Interior to seek equitable relief in the form of injunction or pursue criminal prosecution. It is therefore submitted that this statute under which the plaintiff asserts jurisdiction is inapplicable since the plaintiff is attempting to create a remedy for money damages where a remedy thereunder does not, in fact, exist.

Lack of Personal Jurisdiction

9. Your deponent is informed that Sidney Prival does not share in the profits or loss of the defendant partnership Mathews & Chase nor is he the general or managing

Affidavit of Marshal S. Endick in Support of Motion to Dismiss

agent, nor agent designated to receive process, as more fully set forth in the attached memorandum of law. In fact, Sidney Prival is not an employee of the defendant Mathews & Chase since as of July 1, 1974 Sidney Prival became the employee of C.R.S. Design of New York, Inc., and receives payroll checks from that corporation. Your deponent is further informed that C.R.S. Design of New York Inc., is a separate and distinct entity from the defendant Mathews & Chase. Additionally, a service contract exists between the A. A. Mathews, Inc. Mathews & Chase, and C.R.S. Design Associates, Inc., wherein A. A. Mathews Inc. agreed to provide Mathews & Chase with personnel and technical assistance with respect to the latter's performance of the contract with the City of New York.

The Court is respectfully referred to the Affidavit of Sidney Prival, annexed hereto and made a part of this motion, which Affidavit demonstrates that the said Sidney Prival was not an employee of the defendant Mathews & Chase on the date of the purported service of the Summons upon him. The Court is further respectfully referred to the affidavit of A. A. Mathews, annexed hereto and made part of this motion, which also demonstrates that the said Sidney Prival was not an employee or person designated to receive process in behalf of Mathews & Chase on September 10, 1974. It is to be noted that Mr. Mathews states in his affidavit that he has never been served with a Summons and Complaint in the within action. Mr. Mathews' affidavit is dated September 24, 1974 and subsequent thereto a purported service was made upon Mr. Mathews on October 6, 1974. The validity of the said purported service upon Mr. Mathews will, if necessary, be treated by a subsequent motion and the instant motion relates only to the validity of the service upon Sidney Prival on September 10, 1974.

Affidavit of Marshal S. Endick in Support of Motion to Dismiss

10. Based upon the foregoing, the service of the Summons and Complaint upon Sidney Prival was improper and did not confer personal jurisdiction over the partnership of the defendant Mathews & Chase. Moreover, it is noted that service upon the partnership could have properly been attempted pursuant to the New York Civil Practice Law and Rules including Sections 313, 311, and 308, which is evidenced by the action subsequently taken by the plaintiff in the New York State Court Action on September 10, 1974.

Dismissal or Stay of Federal Court Action on the Basis That Another Action is Pending

11. As heretofore indicated, a Summons and Complaint instituting an action in the Supreme Court, State of New York, County of Bronx, was served upon Sidney Prival on August 7, 1974. Upon a reading of both complaints filed in the Federal Court and served in the State Court action, reveals that both actions were commenced as the result of the same accident involving the plaintiff Samuel Chaneyfield and the allegations of negligence are moreover identical in both actions.

12. In the event the Court does not grant a dismissal of this action based upon lack of subject matter jurisdiction and personal jurisdiction, and only in the event, an order either dismissing the action or staying any further proceedings in this Court should be granted in view of the prior commencement of the State Court Action. Requiring the defendant Mathews & Chase to defend two actions involving the same allegations and issues in two different courts would create undue prejudice and inconvenience, all to the detriment of the defendant Mathews & Chase.

Affidavit of Marshal S. Endick in Support of Motion to Dismiss

WHEREFORE, it is respectfully requested that:

1. An Order be made and entered herein dismissing the Summons & Complaint against the defendant Mathews & Chase on the basis that the Court lacks subject matter jurisdiction because the claim does not arise under the Federal Metal and Non-Metallic Mine Safety Act;

2. An order be made and entered herein quashing the return of service of the Summons because the purported service was made on a person not empowered to receive service of process on behalf of the defendant Mathews & Chase; and

3. In the event the aforementioned Motions are denied, and only in that event, an order dismissing this action or staying any further proceedings in this action on the basis that another action is pending.

4. Such other and further relief as to the Court may seem just and proper.

(Sworn to by Marshal S. Endick, October 23, 1974.)

Affidavit of Sidney Prival in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

SIDNEY PRIVAL, being duly sworn, upon oath deposes and says that:

1. He is employed by C.R.S. Design of New York, Inc. which is a separate and distinct entity from the defendant Mathews & Chase.

2. Your deponent does not share in the profits and loss of the defendant Mathews & Chase and at the time of the service of the Summons and Complaint in this action was not an employee of that Partnership.

3. As heretofore stated, your deponent is a salaried employee of C.R.S. Design of New York, Inc., and does not perform managerial, supervisory and discretionary duties. Annexed hereto and made a part hereof as Exhibit "C" are the statement of earnings of Sidney Prival as paid by C.R.S. Design of New York, Inc. for the period July 12, 1974 through September 20, 1974.

4. On August 7, 1974 your deponent was served with a Summons & Complaint in an action commenced in the Supreme Court of the State of New York, County of Bronx, entitled: Samuel Chaneyfield v. Moran Engineering Company, Mathews & Chase, The Westlectric Casting Company, Banner Industries, Inc., The Fate-Root-Heath Division, The Card Corporation, The Metalloy Steel Foundry Co., Inc.

5. On September 10, 1974 your deponent was served with a Summons & Complaint in action filed in the United

States District Court for the Southern District of New York, #74 Civ. 3845 entitled: Samuel Chaneyfield v. The City of New York and Mathews & Chase.

6. Your deponent respectfully submits that at no time was he authorized to receive process on behalf of the defendant Mathews & Chase.

(Sworn to by Sidney Prival, October 23, 1974.)

Affidavit of A. A. Mathews in Support of Motion to Dismiss.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

A. A. MATHEWS, being duly sworn, according to law, depose and say:

1. He is a partner of the defendants, Mathews & Chase, which is a partnership having its principal place of business at 230 Park Avenue in the City of New York, State of New York.

2. He is a resident of the State of California at 6 Bradbury Hills Road, Bradbury, California.

3. He has never been served with Summons and Complaint in the within action.

4. Deponent has been informed that the within action was commenced by the filing of a Summons and Complaint dated September 4, 1974 in the U. S. District Court for the Southern District of New York.

Affidavit of A. A. Mathews in Support of Motion to Dismiss

5. Upon information and belief this Summons and Complaint was served upon Sidney Prival on or about September 10, 1974 in the City of New York, State of New York.

6. Sidney Prival is not a partner of Mathews & Chase and was not a partner of Mathews & Chase on or about September 10, 1974, neither does said Sidney Prival share in the profits or losses of said partnership.

7. Sidney Prival has not nor has he ever been designated as agent to receive process in the State of New York for the partnership Mathews & Chase.

8. Sidney Prival is not nor was he on or about September 10 1974 a managing or general agent or an employee of the partnership Mathews & Chase.

Dated: September 24, 1974.

(Sworn to by A. A. Mathews, September 24, 1974.)

Exhibit A, Annexed to Affidavit of Marshal S. Endick—Summons.

UNITED STATES DISTRICT COURT,

For The

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To the above named Defendants:

You are hereby summoned and required to serve upon Corcoran and Brady, Esqs., plaintiff's attorneys, whose address 11 Park Place, New York, New York 10007, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so judgment by default will be taken against you for the relief demanded in the complaint.

Dated: September 4, 1974

RAYMOND F. BURGHARDT,
Clerk of Court.

E. A. BECKER
Deputy Clerk.

[Seal of Court]

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick—Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

JURISDICTION OF THIS COURT IS CLAIMED UNDER THE FEDERAL METAL AND NON-METALLIC MINE SAFETY ACT, TITLE 30, SECTION 721, U. S. C. *et seq.*

The Plaintiff, by his Attorneys, Corcoran and Brady, Esqs., for his complaint, upon information and belief, alleges as follows:

1. That at all the times hereinafter mentioned, the defendant, The City of New York, was and is a municipal corporation organized and existing under the laws of the State of New York.

2. That at all the times hereinafter mentioned, the plaintiff, Samuel Chaneyfield, age 50 years, was a licensed Operating Engineer, and resided at 3041 Wickham Avenue, Borough and County of the Bronx, City and State of New York, and within the jurisdiction of this Court.

3. That at all the times hereinafter mentioned, the defendant, The City of New York, undertook to build a tunnel, underground, as a means or facility for the disposal of sewerage accumulated in the City of New York, and more particularly in the Borough of Manhattan.

4. That at all the times hereinafter mentioned, the defendant, The City of New York, entered into a contract with Perini, Brown & Root, Gordon Ball, a Joint Venture, for the construction of a Tunnel, known as the North Branch Intercepting Sewer Contract No. 3, Compressed Air job, in the Borough of Manhattan, County and City of New York.

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

5. That at all the times hereinafter mentioned, the defendant, The City of New York, was the owner of the area of land from which mineral in the form of Rock, known as Manhattan Schist, was extracted from the tunneling of the sewer aforesaid.

6. That at all the times hereinafter mentioned, the mineral, in the form of Manhattan Schist, or some of it, upon being extracted during the tunneling operations by underground workers, many feet below the surface of the ground, was hoisted to the surface and thereafter conveyed by trucks to the State of New Jersey.

7. That the mineral in the form of Manhattan Schist, extracted from its natural deposit underground, regularly entered commerce or the operations of which affected commerce.

8. Upon information and belief, the mineral, in the form of Manhattan Schist, was regularly conveyed on a daily basis from the shafts of the tunnel located at various points in the Borough of Manhattan, City of New York, and more particularly at the shaft located at West 79th Street and Riverside Drive, in the Borough of Manhattan, City of New York.

9. That upon information and belief, that since the commencement of the tunneling operations for the construction of the North Branch Intercepting Sewer, to date, there have been numerous accidents resulting in death and serious injuries to the underground and surface workers engaged in the extraction of the mineral, known as Manhattan Schist.

10. That all of the mineral, known as Manhattan Schist, or a substantial part hereof, was extracted by underground workers in drilling and blasting operations in the tunnel.

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

11. That the tunnel aforesaid being built underground by the extraction of mineral known as Manhattan Schist is equipped with underground passageways, railroad trackage, locomotives, muck cars, drilling machines and tools, which along with dynamite and other explosive substances, are used to blast the mineral, known as Manhattan Schist, from its natural deposits underground.

12. That the mineral known as Manhattan Schist and other rock formation upon extraction from its natural deposits in the tunnel being mined for the said Intercepting Sewer aforesaid was sold by the defendant, The City of New York, or its agents or contractors, at a profit.

13. That at all the times hereinafter mentioned, the plaintiff was employed as a locomotive engineer by Perini, Brown & Root, Gordon Ball, a Joint Venture, of 437 Madison Avenue, Borough of Manhattan, County and City of New York.

14. That the Tunnel Mined Underground, known as the North Branch Intercepting Sewer, Contract No. 3, Compressed Air jog aforesaid, extended over a distance of miles from West 50th Street to about West 179th and Isham Streets, Borough of Manhattan, County and City of New York.

15. That at all the times hereinafter mentioned, the Tunnel Mined Underground out of Solid Rock and known as North Branch Intercepting Sewer, Contract No. 3, Compressed Air Job, was built in sections which commenced in the vicinity of West 50th Street and proceeded northerly to West 125th Street where another section of the said Sewer job commenced and continued northerly to West 149th Street; thence the Sewer job proceeded northerly from West 149th Street to about West 179th Street, all in the Borough of Manhattan, County and City of New York.

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

16. That at all the times hereinafter mentioned, there was constructed a deep shaft at or near West 79th Street and Riverside Drive which descended from street level many hundreds of feet where it connected with the Tunnel which ran north and south of West 79th Street, in the Borough of Manhattan, County and City of New York aforesaid.

17. That there was constructed in said Tunnel, hundreds of feet below street level, a narrow gauge railroad on which traveled a diesel locomotive and which was used to pull and push muck cars, loaded with rock blasted from the tunnel along with other material excavated from the said sewer tunnel in the vicinity of the shaft at West 79th Street.

18. That said narrow gauge railroad tracks ran generally north and south and was approximately 36 inches in width and continued to be constructed and extended in a generally northerly direction in the tunnel as the heading continued to be blasted and excavated of rock.

19. That at all the times hereinafter mentioned, the employer, Perini, Brown & Root, Gordon Ball, a Joint Venture, had a written contract with The City of New York, Department of Public Works and/or the Environmental Protection Administration or other Department of The City of New York, for the construction and completion of said Tunnel, including the Deep Shaft at West 79th Street and Riverside Drive, in the Borough of Manhattan, County and City of New York.

20. That the said contract aforesaid between The City of New York, Department of Public Works and/or Environmental Protection Administration or other Department, in addition to the work involved in constructing the shafts and tunnelways for the said Intercepting Sewer,

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

provided for the purchase of appliances and equipment necessary in the performance of the work, including but not limited to narrow gauge railroad tracks, hoistways, car couplers, muck cars and locomotives to pull and push said muck cars to and from the shafts, including the shaft located at West 79th Street and Riverside Drive, in the Borough of Manhattan, City of New York.

21. That at all the times hereinafter mentioned, the Tunnel formed by the extraction of Manhattan Schist from the areas of land owned by The City of New York aforementioned, for the construction of the North Branch Intercepting Sewer, was a mine within the meaning and intent of the Federal Metal and Non-Metallic Mine Safety Act, Title 30, U. S. C. Section 721, *et sequitur*.

22. Upon information and belief, the defendant, The City of New York, under the contract with Perini, Brown & Root, Gordon Ball, a Joint Venture, undertook to purchase or advance moneys for the purchase of equipment for the tunneling operations aforesaid, including muck cars, locomotives and trackage, to haul the mineral known as Manhattan Schist from the tunnel being mined, to the shaft located at West 79th Street and Riverside Drive, for ultimate delivery by truck to the State of New Jersey and elsewhere.

23. Upon information and belief, the muck cars used in the hauling of the Manhattan Schist and other mineral and rock formation extracted underground were purchased by Perini, Brown and Root, Gordon Ball, a Joint Venture, from Moran Engineering Company of Los Angeles, California.

24. Upon information and belief, the muck cars furnished, sold and/or delivered the The City of New York or Perini, Brown and Root, Gordon Ball, a Joint Venture,

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

were equipped with a steel coupler, known as the "Can't Miss Coupler", or with a steel coupler having the same design as the "Can't Miss Coupler".

25. Upon information and belief, the "Can't Miss Coupler" or coupler used on the muck cars in the tunnel at or near the West 79th Street shaft consisted of a "female" and "male" part which were held together by a "V" shaped wedge or dog.

26. Upon information and belief, the said coupler equipped with a "V" shaped wedge or dog required a bolt or rivet to be inserted into the "V" shaped wedge or dog to prevent the wedge or "dog" from being projected upwards during periods when the muck cars were being pushed or pulled by the Diesel Locomotive.

27. Upon information and belief, the design, formation, manufacture and casting of the coupler used on the muck cars furnished by Moran Engineering Company were improper, defective and dangerous in that said muck cars became uncoupled during periods when the muck cars were being pulled or pushed, by the locomotive, particularly when said muck cars were loaded with mineral rock, known as Manhattan Schist, weighing many tons.

28. That at all the times hereinafter mentioned, the defendant, Mathews and Chase, were located in the Borough of Manhattan, City of New York, and within the jurisdiction of this Court.

29. That at all the times hereinafter mentioned, the defendant, The City of New York, contracted with the firm of Mathews and Chase, of 230 Park Avenue, and 181st Street and Riverside Drive, in the Borough of Manhattan, to check over and review the plans and specifications for the said tunneling operations for the purpose of having the

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

same complied with by Perini, Brown and Root, Gordon Ball, a Joint Venture, and other contractors and suppliers for the Tunnel job at West 79th Street and Riverside Drive.

30. Upon information and belief, the defendant, Mathews and Chase, under the duties imposed on it by the terms of the contract between The City of New York, and the defendant, Mathews and Chase, was required to recommend, order and inspect equipment and machines and parts of said equipment for purposes of efficiency and safety.

31. That at all the times hereinafter mentioned, The City of New York was the general contractor for the construction of the Tunnel in connection with the construction of the said Intercepting Sewer aforementioned.

32. That on September 13, 1971, at about 10:00 P. M., the plaintiff was operating a locomotive manufactured, sold and delivered by Banner Industries, Inc. The Fate-Root-Heath Division, which locomotive was pulling ten (10) muck cars loaded with rock in the north heading of the sewer tunnel connected with the shaft at 79th Street and Riverside Drive.

33. That on the 13th day of September, 1971, aforesaid, and at or about 10:00 P. M., the last nine of the cars loaded with rock attached to the locomotive being operated by the plaintiff became disengaged when the "V" shaped wedge or dog was projected upward and out of the slot or opening of the said coupler aforesaid.

34. That following the disengagement of the nine loaded muck cars from the original train of ten cars, the plaintiff continued to operate the locomotive with one car attached, without knowledge that nine muck cars were following his locomotive down an incline, until the nine cars crashed with great force and violence into the rear of

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

the one muck car that remained attached to the locomotive, causing the plaintiff's body to be projected out of the cab of the locomotive on to the ground adjacent and in close proximity to the tracks, as a result of which the wheels of the muck car attached to the locomotive rode over his left arm and humerus, causing the same to be almost severed and amputated and resulting in the severe and permanent injuries hereinafter set forth.

35. That the said accident and the injuries resulting to the plaintiff therefrom were caused solely by reason of the negligence of the defendants and without any negligence on the part of the plaintiff contributing thereto, in that the defendants used or permitted to be used a muck car coupler that was improper and dangerously defective in design, manufacture and fabrication; that the said defendants were negligent and careless in using or permitting to be used an inherently dangerous appliance; the said defendants were negligent in failing to foresee that the "V" shaped wedge or "dog" by reason of its latent improper design, would be inserted into the slot or opening of the coupler to secure the "male" and "female" parts thereof in a reverse position and thereby permit and enable the said wedge or "dog" to work itself upward and out of the slot and cause the coupler to disengage the muck cars being pulled or pushed to separate and ride "free" and out of control, particularly on tracks that were on an incline or curve; in failing to make appropriate tests to inform the plaintiff of the latent, inherent danger and hazard in the coupler, particularly when the wedge or "dog" would be mistakenly inserted into the slot or opening in a reverse position and thus enable the wedge to work itself upward and out and thereby cause the muck cars or locomotive to disengage from each other; in failing to attach warnings to alert the workmen in

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

coupling cars of the danger of inserting the wedge into the slot in a reverse position or without inserting the rivet or bolt to hold the wedge in place; in failing to attach a chain or cable as a supplementary or secondary appurtenance to the coupler in the event that the same became disengaged due to the failure of the coupler; the defendants and each of them were negligent in failing to properly inspect the coupler and its component parts, in actual operation when the muck cars would be loaded and moved in a pull or push position by the locomotive; and the defendants, and each of them, were negligent in failing to give the plaintiff a safe place to work, particularly on the "ways and approaches" and in violating the laws, statutes and ordinances of the Labor Law of the State of New York, and the laws and regulations of the Federal Government for the safety of tunnel and mining operations, as well as Code Rule 23, and other rules of the New York State Board of Standards and Appeals in such cases made and provided.

36. That solely by reason of the negligence, recklessness and carelessness of the defendants, and each of them, the plaintiff suffered a compound and comminuted fracture of the distal left humerus; the entire neurovascular bundle was exposed secondary to the accident; the plaintiff underwent debridement at Roosevelt Hospital and serial closures until a large, gaping, open wound was closed medially; the plaintiff suffered a burn which involved portions of his upper extremity and was required to have his left arm held together by a Kirschner in the Olecranon and a long arm cast which was removed approximately ten weeks post fracture and then placed in a Melrose sling; the plaintiff suffered considerable loss of tissue, both anteriorly and posteriorly with severe injury to this region; the plaintiff has a permanent restriction

Exhibit A, Continued, Annexed to Affidavit of Marshal S. Endick

of the left arm and shoulder with a range of motion from zero to 120 degrees of abduction; at the elbow the plaintiff has 100 degrees of flexion; the plaintiff has loss of the flexor extensor groups of the elbow with a loss of muscle strength; the plaintiff has suffered a definite and permanent loss of a good portion of his biceps Brachialis muscle and triceps muscle group as well as considerable injury to the surrounding soft tissues and bone; the plaintiff has suffered a delay in healing of the humerus; and the plaintiff was otherwise injured in his head, body and limbs and suffered severe shock to the nervous system and to the brain, accompanied by headaches and was otherwise rendered sick, sore, lame and disabled and the plaintiff is informed and verily believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience and said plaintiff has been confined to a hospital and to his home and bed for a long period of time and was obliged to and did necessarily employ medical aid and attendance and was prevented from attending to his usual duties of employment as an Operating Engineer for a long period of time, all to his damage in the sum of One Million and 00/100 ($1,000,000.00) Dollars.

WHEREFORE, the plaintiff demands judgment in the sum of One Million and 00/100 ($1,000,000.00) Dollars, together with the costs and disbursements of this action.

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, New York 10007
Tel: 227-2242

By: WILLIAM J. CORCORAN
A Member of the Firm.

Exhibit B, Annexed to Affidavit of Marshal S. Endick—Summons (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

Plaintiff designates Bronx County as the place of trial.

The basis of the venue is Plaintiff resides in Bronx County.

Plaintiff resides at 3041 Wickham Ave., County of Bronx.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of

Exhibit B, Annexed to Affidavit of Marshal S. Endick

your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, June 25, 1974

CORCORAN AND BRADY
Attorneys for Plaintiff
Post Office Address
11 Park Place
New York, N. Y. 10007
Tel: 227-2242

Defendants' addresses:

Moran Engineering Co., 7421 E. Slauson Ave., Los Angeles, Calif.

Mathews & Chase, 230 Park Ave., N. Y. C.

Westlectric Castings Co., 2040 Camfield, Los Angeles, Calif.

Banner Industries, Inc., Plymouth, Ohio.

The Card Corp., 2501 W. 16th Ave., Denver, Colo.

The Metalloy Steel Foundry Co., 8588 Thys Ct., Sacramento, Calif. 95828.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Verified Complaint (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

The Plaintiff, Samuel Chaneyfield, by his Attorneys, Corcoran and Brady, for his Verified Complaint, upon information and belief, alleges as follows:

1. That at all the times hereinafter mentioned, the defendants, and each of them, Moran Engineering Co., The Westlectric Castings Company, Banner Industries, Inc., The Fate-Root-Heath Division, The Card Corporation, and The Metalloy Steel Foundry Co., Inc., are foreign corporations which transacts business in the State of New York and/or regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the State of New York or expects or should reasonably expect the tortious act of improperly designing, manufacturing, selling or distributing of couplers for the use of tunnel muck cars in the State of New York to have consequences in the State of New York

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

and derives substantial revenue from interstate or international commerce or owns, uses or possess any real property situated within the State of New York, as more specifically set forth in Sections 302 and 313 of the Civil Practice Law and Rules of the State of New York.

1-A. That at all the times hereinafter mentioned, the Plaintiff, Samuel Chaneyfield, age 50 years, was a licensed Operating Engineer, and resided at 3041 Wickham Avenue, in the Borough and County of the Bronx, City and State of New York.

2. That at all the times hereinafter mentioned, the Plaintiff was employed as a licensed Operating Engineer in the employ of Perini, Brown & Root, Gordon Ball, a Joint Venture, of 437 Madison Avenue, in the Borough of Manhattan, County and City of New York.

3. That at all the times hereinafter mentioned, the Employer Perini, Brown & Root, Gordon Ball, a Joint Venture, was the general contractor for the City of New York in the construction of the North Branch Intercepting Sewer, Contract No. 3, Compressed Air job, in the Borough of Manhattan, County and City of New York.

4. That the North Branch Intercepting Sewer, Contract No. 3, Compressed Air job, aforesaid, extended over a distance of miles from West 50th Street to about West 179th Street and Isham Street, Borough of Manhattan, County and City of New York.

5. That at all the times hereinafter mentioned the North Branch Intercepting Sewer, Contract No. 3, Compressed Air Job, was built in sections which commenced in the vicinity of West 50th Street and proceeded northerly to West 125th Street where another section of the said Sewer Job was commenced and continued northerly

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

to West 149th Street; thence the Sewer job proceeded northerly from West 149th Street to about West 179th Street, all in the Borough of Manhattan, County and City of New York.

6. That at all the times hereinafter mentioned, there was constructed a deep shaft at or near West 79th Street and Riverside Drive which descended from street level many hundreds of feet where it connected with the Sewer Tunnel which ran north and south of West 79th Street in the Borough of Manhattan, County and City of New York aforesaid.

7. That there was constructed in said Sewer Tunnel, hundreds of feet below street level, a narrow gauge railroad on which traveled a diesel locomotive and which was used to pull and push muck cars, loaded with rock blasted from the tunnel along with other material excavated from the said sewer tunnel in the vicinity of the shaft at West 79th Street.

8. That said narrow gauge railroad tracks ran generally north and south and was approximately 36 inches in width and continued to be constructed and extended in a generally northerly direction in the tunnel as the heading continued to be blasted and excavated of rock.

9. That at all the times hereinafter mentioned the Employer, Perini, Brown & Root, Gordon Ball, a Joint Venture, had a written contract with the City of New York, Department of Public Works and/or the Environmental Protection Administration or other Department of the City of New York, for the construction and completion of said Sewer Tunnel, including the Deep Shaft at West 79th Street and Riverside Drive in the Borough of Manhattan, County and City of New York.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

10. That the said contract aforesaid between the City of New York, Department of Public Works and/or Environmental Protection Administration or other Department in addition to the work involved in constructing the shafts and tunnelways for the said Intercepting Sewer, provided for the purchase of appliances and equipment necessary in the performance of the work, including but not limited to narrow gauge railroad tracks, hoistways, car couplers, muck cars and locomotives to pull and push said muck cars to and from the shafts, including the shaft located at West 79th Street and Riverside Drive in the Borough of Manhattan, City of New York.

11. That at all the times hereinafter mentioned the Defendant Moran Engineering Co. was a corporation organized under the laws of the State of California under date of July 21, 1967 with its principal place of business at 7421 E. Slauson Avenue, Los Angeles, California.

12. That at all the times hereinafter mentioned the Defendant Moran Engineering Co. were builders of underground excavation equipment.

13. That upon information and belief, the Defendant Moran Engineering Co. built the steel muck cars used on the narrow gauge railroad in the tunnel at or near the shaft located at West 79th Street and Riverside Drive in the Borough of Manhattan, City of New York.

14. That upon information and belief, the Defendant Moran Engineering Co. supplied and equipped the muck cars used in the Sewer Tunnel at or near the shaft at West 79th Street and Riverside Drive with a steel coupler known in the trade as the "Can't Miss Coupler".

15. That on or about January 21, 1970, the Defendant Moran Engineering Co. sold and shipped to the Plaintiff's Employer, Perini, Brown & Root, Gordon Ball, a

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

Joint Venture and/or The City of New York, muck cars with couplers attached for use in the construction of the sewer job aforesaid for and on behalf of the City of New York.

16. That the "Can't Miss Coupler" aforesaid was made of a steel forging or steel casting consisting of a "male" and "female" part which were held together by means of a wedge or "dog" through which was inserted a steel bolt or rivet.

17. That upon information and belief the said "Can't Miss Coupler" was designed, cast, forged or manufactured and used by the Defendant Moran Engineering Co.

18. That upon information and belief the "Can't Miss Coupler" was used by the Moran Engineering Co. to attach muck cars to the Locomotive as well as muck cars to other muck cars for use in hauling the rock and other material blasted and excavated from the sewer tunnel to and from the shaftway at West 79th Street and Riverside Drive, in the City of New York.

19. Upon information and belief the "Can't Miss Coupler" was designed by the Defendant The Westlectric Castings Company of Los Angeles, California.

20. That at all the times hereinafter mentioned, the Defendant The Westlectric Castings Company cast the "Can't Miss Coupler" used on the muck cars furnished to the Plaintiff's employer at the 79th St. shaft of the tunnel.

21. That at all the times hereinafter mentioned the Defendant Banner Industries, Inc. The Fate-Root-Heath Division, was a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at Plymouth, Ohio.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

22. That at all the times hereinafter mentioned the Defendant Banner Industries, Inc. The Fate-Root-Heath Division manufactured and distributed a Locomotive known as the Plymouth DMD Locomotive.

23. That at all the times hereinafter mentioned the Defendant Banner Industries, Inc. The Fate-Root-Heath Division sold and delivered a Plymouth locomotive to the Perini, Brown & Root, Gordon Ball, a Joint Venture, and/or The City of New York, for its use in the construction of the Sewer Tunnel.

24. On information and belief the Plymouth Locomotive sold and delivered to the Perini, Brown & Root, Gordon Ball, a Joint Venture, was used by the joint venture in connection with the construction of the sewer tunnel at or near the shaft located at West 79th Street and Riverside Drive in the County and City of New York.

25. Upon information and belief, the Defendant Banner Industries, Inc. The Fate-Root-Heath Division purchased the "Can't Miss Coupler" from the Moran Engineering Company.

26. Upon information and belief the Defendant Banner Industries, Inc. The Fate-Root-Heath Division attached the "Can't Miss Coupler" to the Plymouth Locomotive which it sold and/or delivered to the Joint Venture, known as Perini, Brown & Root, Gordon Ball, a Joint Venture, sometime prior to September 13, 1971.

27. That at all the times hereinafter mentioned the Defendant Mathews and Chase is a firm of consultant engineers with offices at 230 Park Avenue and Riverside Drive and 181st Street in the Borough of Manhattan, City and State of New York and within the jurisdiction of this Court.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

28. Upon information and belief, the firm of Mathews and Chase was engaged by the City of New York, as consulting engineers, to oversee the work of the joint venture, Perini, Brown & Root, Gordon Ball, insofar as the carrying out of their obligations under the contracts and specifications for the construction of the sewer tunnel and more specifically that phase undertaken at the Sewer Tunnel where the same connects with the Shaft located at West 79th Street and Riverside Drive in the Borough of Manhattan, City and State of New York.

29. That among the duties of the Defendant Mathews and Chase were the duties of checking and verifying the work called for under the plans, blue prints and specifications and the material and equipment used on the part of the joint venture in carrying out and completing its work of constructing the Sewer Tunnel.

30. That upon information and belief the Defendant Mathews and Chase under the duties imposed on it by the terms of the contract between the City of New York and the Defendant Mathews and Chase, was required to recommend, order and inspect equipment and machines and parts of said equipment for purposes of efficiency and safety.

30. (a) That at all the times hereinafter mentioned, the Defendant The Metalloy Steel Foundry Co., Inc. was and is a foreign corporation organized and existing by virtue of the Laws of the State of California and has an office for the transaction of its business at 8588 Thys Court, Sacramento, California 95828.

30. (b) Upon information and belief, the Defendant The Metalloy Steel Foundry Co., Inc. designed, fabricated, forged, cast, sold and delivered to the Moran Engineering Co. a steel coupling of the type known as the "Can't Miss Coupler".

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

30. (c) That at all the times hereinafter mentioned the Defendant The Metalloy Steel Foundry Co., Inc. sold and delivered to the Moran Engineering Co. or to the Plaintiff's Intestate's employer, Perini, Brown & Root, Gordon Ball, Joint Venture and/or The City of New York, the steel coupler of the type known as the "Can't Miss Coupler" for use on the muck cars for use in the construction of the sewer described in Paragraphs 3, 4, 5 and 6 of this Complaint.

30. (d) That at all the times hereinafter mentioned, the Defendant The Card Corporation was and is a foreign corporation organized and existing by virtue of the Laws of the State of Colorado with its principal office at 2501 West 16th Avenue, Denver, Colorado.

30. (e) Upon information and belief, the Defendant The Card Corporation designed, fabricated, forged, cast, sold and delivered to the Moran Engineering Co. a steel coupling of the type known as the "Can't Miss Coupler".

30. (f) That at all the times hereinafter mentioned the Defendant The Card Corporation sold and delivered to the Moran Engineering Co. or to the Plaintiff's Intestate's employer, Perini, Brown & Root, Gordon Ball, Joint Venture, and/or The City of New York, the steel coupler of the type known as the "Can't Miss Coupler" for use on the muck cars for use in the construction of the sewer described in Paragraphs 3, 4, 5 and 6 of this Complaint.

31. That one of the component parts used in the "Can't Miss Coupler" was a "V" shaped wedge or "dog" which was used to hold the male and female parts of the coupler together whenever the muck cars were being pulled or pushed by the Plymouth locomotive in the tunnel.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

32. That upon information and belief, the "V" shaped wedge or "dog" was designed in such a manner which required it to be inserted in a particular and special manner, along with a rivet or bolt into the opening to hold the "male and female" portions of the coupler secure; that upon information and belief that when the "V" shaped wedge or "dog" is inserted into the opening in a reverse position, it has a tendency to "ride up" from the opening, by reason of the "V" shape or angular design, particularly when the muck cars are being pushed by the locomotive manufactured by the Defendant.

33. Upon information and belief, if the "V" shaped wedge or "dog" is inserted into the opening to secure the "male" and "female" parts of the coupler, in a reverse position, the rivet or bolt to lock the wedge into position is impossible to insert.

34. That upon information and belief, the "Can't Miss Coupler" designed by the Defendant Moran Engineering Company and/or manufactured, forged or cast by the Defendants Mathews and Chase, The Westlectric Castings Company, Banner Industries, Inc., The Fate-Root-Heath Division, The Card Corporation, The Metalloy Steel Foundry Co., Inc. was designed and made by the Defendants to permit a quick and expeditious manner in disengaging the "male" from the "female" portion of the coupler and thereby separate the muck car from the locomotive or to disengage one muck car from another.

35. Upon information and belief, the "Can't Miss Coupler" or coupler provided by the Defendant Moran Engineering Co. to the Plaintiff's employer was designed, manufactured, forged or cast in such a manner, so as to permit the securing of the "male" and "female" portions of the coupler without the necessity of inserting the rivet or bolt to "lock" in the two component parts aforesaid.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

36. That on September 13, 1971 at about 10 P.M. the Plaintiff was operating a locomotive manufactured, sold and delivered by the Defendant Banner Industries, Inc. The Fate-Root-Heath Division, which locomotive was pulling 10 muck cars loaded with rock in the north heading of the sewer tunnel connected with the shaft at 79th Street and Riverside Drive.

37. That on the 13th day of September 1971 aforesaid and at or about 10 P.M. the last nine of the cars loaded with rock attached to the locomotive being operated by the Plaintiff became disengaged when the "V" shaped wedge or dog was projected upward and out of the slot or opening of the said coupler aforesaid.

38. That following the disengagement of the nine loaded muck cars from the original train of 10 cars, the Plaintiff continued to operate the locomotive with one car attached, without knowledge that 9 muck cars were following his locomotive down an incline, until the nine cars crashed with great force and violence into the rear of the one muck car that remained attached to the locomotive, causing the Plaintiff's body to be projected out of the cab of the locomotive on to the ground adjacent and in close proximity to the tracks as a result of which the wheels of the muck car attached to the locomotive rode over his left arm and humerus causing the same to be almost severed and amputated and resulting in the severe and permanent injuries hereinafter set forth.

39. That the said accident and the injuries resulting to the Plaintiff therefrom were caused solely by reason of the negligence of the Defendants and without any negligence on the part of the Plaintiff contributing thereto; in that the Defendants, designed, manufactured, cast, forged, sold, distributed and delivered a muck car coupler, that was improper and dangerously defective in design,

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

manufacture and fabrication; that the said Defendants were negligent and careless in designing, manufacturing, selling an inherently dangerous appliance; the said Defendants were negligent in failing to foresee that the "V" shaped wedge or "dog" by reason of its latent improper design, would be inserted into the slot or opening of the coupler to secure the "male" and "female" parts thereof in a reverse position by a workman or person working in the sewer tunnel and thereby permit and enable the said wedge or "dog" to work itself upward and out of the slot and thereby cause the coupler to disengage and cause the muck cars being pulled or pushed to separate and ride "free" and out of control, particularly on tracks that were on an incline or curve; in designing, manufacturing and selling a coupler to the plaintiff's employer which could be connected by a wedge or "dog" without the use of a rivet or bolt to hold the wedge or "dog" in place; in failing to make appropriate tests to inform the defendants of the latent, inherent danger and hazard in the coupler, particularly when the wedge or "dog" would be mistakenly inserted into the slot or opening in a reverse position and thus enable the wedge to work itself upward and out and thereby cause the muck cars or locomotive to disengage from each other; in failing to attach warnings to alert the workmen in coupling cars of the danger of inserting the wedge into the slot in a reverse position or without inserting the rivet or bolt to hold the wedge in place; in failing to attach a chain or cable as a supplementary or secondary appurtenance to the coupler in the event that the same became disengaged due to the failure of a workman engaged in handling the coupler operations to insert the wedge in a proper position or in failing to insert the rivet or bolt to lock the wedge in the slot; the Defendants and each of them were negligent in failing to properly inspect

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

the coupler and its component parts, in actual operation when the muck cars would be loaded and moved in a pull or push position by the locomotive built and sold by the Defendant Banner Industries, Inc., The Fate-Root-Heath Division and the Defendants and each of them were negligent in violating laws, statutes and ordinances of the Labor Law of the State of New York, and the laws and regulations of the Federal Government for the safe conduct of tunnel operators as well as Code Rule 23, and other rules of the New York State Board of Standards and Appeals in such cases made and provided.

40. That solely by reason of the negligence, recklessness and carelessness of the Defendants and each of them, the Plaintiff suffered a compound and comminuted fracture of the distal left humerus; the entire neurovascular bundle was exposed secondary to the accident; the Plaintiff underwent debridement at Roosevelt Hospital and serial closures until a large, gaping, open wound was closed medially; the Plaintiff suffered a burn which involved portions of his upper extremity and was required to have his left arm held together by a Kirschner in the Olecranon and a long arm cast which was removed approximately ten weeks post fracture and then placed in a Melrose sling; the Plaintiff suffered considerable loss of tissue, both anteriorly and posteriorly with severe injury to this region; the Plaintiff has a permanent restriction of the left arm and shoulder with a range of motion from zero to 120 degrees of abduction; at the elbow the Plaintiff has 100 degrees of flexion; the Plaintiff has loss of the flexor extensor groups of the elbow with a loss of muscle strength; the Plaintiff has suffered a definite and permanent loss of a good portion of his biceps Brachialis muscle and triceps muscle group as well as considerable injury to the surrounding soft tissues and bone; the

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

Plaintiff has suffered a delay in healing of the humerus and the Plaintiff was otherwise injured in his head, body and limbs and suffered severe shock to the nervous system and to the brain, accompanied by headaches and was otherwise rendered sick, sore, lame and disabled and the Plaintiff is informed and verily believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience and said Plaintiff has been confined to a hospital and to his home and bed for a long period of time and was obliged to and did necessarily employ medical aid and attendance and was prevented from attending to his usual duties of employment as an operating engineer for a long period of time, all to his damage in the sum of One Million and 00/100 ($1,000,000.00) Dollars.

WHEREFORE, the Plaintiff demands judgment in the sum of One Million and 00/100 ($1,000,000.00) Dollars together with the costs and disbursements of this action.

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, New York 10007
Tel: (212) 227-2242

(Verified, June 27, 1974.)

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Answer of Defendant Mathews and Chase (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

Defendant, Mathews and Chase, a partnership, by its attorneys, Kroll, Edelman, Elser & Wilson, answering the verified Complaint of plaintiff, respectfully alleges as follows:

1. DENIES any knowledge or information sufficient to form a belief thereof as to the truth of the allegations contained in paragraphs "1", "1-A", "2", "6", "7", "8", "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", "21", "22", "23", "24", "25", "26", "30(a)", "30(b)", "30(c)", "30(d)", "30(e)", "30(f)". "31", "32", "33", "35", "36", "37", "38".

2. DENIES the allegations contained in paragraphs "3", "4", "5", "9", "10", "27", "28", "29", "30", "34", "39", "40".

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endic

AS AND FOR A FIRST AFFIRMATIVE DEFENSE DEFENDANT MATHEWS AND CHASE RESPECTFULLY ALLEGES:

3. That the Summons and Verified Complaint was not properly served on the answering defendant and that by reason thereof the Court lacks jurisdiction over the person of said answering defendant.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE DEFENDANT MATHEWS AND CHASE RESPECTFULLY ALLEGES:

4. That the Complaint fails to state a cause of action as against Defendant Mathews and Chase upon which relief may be granted.

WHEREFORE, this defendant demands judgment dismissing the Complaint of the plaintiff herein, together with the costs and disbursements of this action.

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Mathews & Chase,
a co-partnership,
Office & P. O. Address
22 East 40th Street
New York, New York 10016

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Demand for Verified Bill of Particulars (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

Sirs:

Please Take Notice, that within ten (10) days from the date hereof, defendant Mathews and Chase, a partnership, demands that you serve upon the undersigned a verified Bill of Particulars of the Complaint, setting forth in detail the following:

1. The date and time of day of the alleged accident.

2. The exact location of the alleged accident including street number.

3. The precise acts of plaintiff immediately prior to the alleged accident.

4. State the condition or instrumentality it is alleged caused the accident which is the subject of this litigation.

5. If it is claimed a defective condition or instrumentality existed state whether actual or constructive notice was given to any of the defendants.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

6. State when and to whom said notice was given.

7. If constructive notice is claimed, state for how long a period of time it is claimed the said condition existed.

8. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant Mathews and Chase.

9. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant Moran Engineering Company.

10. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant The Westlectric Castings Company.

11. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant Banner Industries, Inc., The Fate Root-Heath Division.

12. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant The Card Corporation.

13. Set forth in detail a statement of the acts or omissions constituting the negligence and carelessness claimed with respect to the defendant The Metalloy Steel Foundry Co. Inc.

14. Specify each and every act, error or omission plaintiff will claim constituted the negligence in the design manufacture, casting, forging, selling, distribution and delivery of a muck car coupler and which part or parts were defective thereof as contained in paragraph 39 of the Complaint.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

15. State which defendant it is claimed was negligent in the design, manufacture, casting, forging, selling, distribution and delivery of the muck car.

16. Specify each and every act, error or omissions plaintiff will claim constituted the negligence in the designing manufacturing and selling of the alleged inherently dangerous appliance.

17. State which defendant it is claimed was negligent and careless in the designing, manufacturing and selling the alleged inherently dangerous appliance.

18. Specify each and every act, error or omission plaintiff will claim constituted the negligence and defects in the "V" shaped wedge or "dog".

19. State which defendant it is claimed was negligent in failing to foresee that the "V" shaped wedge or "dog" by reason of its latent improper design would cause the coupler to disengage.

20. Specify each and every act, error or omission the plaintiff will claim constituted the negligence in designing, manufacturing and selling a coupler which could be connected by a wedge or "dog" without the use of a rivet or bolt to hold the wedge or "dog" in place.

21. State which defendant it is claimed was negligent in designing, manufacturing and selling of the aforemention coupler.

22. State which defendant it is claimed was negligent in failing to make appropriate tests in which to inform as to the latent, inherent danger and hazard in the coupler.

23. Specify each and every act, error or omission the plaintiff will claim constituted negligence in failing to make tests as stated in paragraph 39 of the complaint.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

24. Specify the latent, inherent danger and hazard in the coupler.

25. State which defendant is is claimed failed to attach warnings to alert the workmen in coupling cars of the danger of inserting the wedge into the slot in a reverse position or without inserting the rivet or bolt to hold the wedge in place.

26. Specify each and every act, error or omission the plaintiff will claim constituted negligence in not attaching warnings as stated in paragraph 39 of the Complaint.

27. Specify the danger of inserting the wedge into the slot in a reverse position or without inserting the rivet or bolt to hold the wedge in place.

28. State which defendant is is claimed failed to attach a chain or cable to the coupler.

29. Specify each and every act, error or omission the plaintiff will claim constituted the alleged negligence in failing to inspect the couple and its component parts in actual operation.

30. State which defendants it is claimed failed to inspect the coupler and its component parts in actual operation.

31. A statement of the injuries sustained by the plaintiff as a result of the alleged accident and a description of those claimed to be of a permanent nature.

32. Length of time the plaintiff was confined to a hospital; to his bed; and to his home.

33. Length of time the plaintiff was totally disabled.

34. Length of time the plaintiff was partially disabled.

35. Length of time the plaintiff was incapacitated from his regular employment.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

36. Total amounts claimed by plaintiff as special damages for:

(a) Hospital expense.

(b) Physicians services.

(c) Nurses services.

(d) Medical supplies.

(e) Loss of earnings, if any.

37. If loss of earnings is claimed name and address of plaintiff's employer.

38. Any and all other special damages claimed, indicating nature and amount of same.

39. Set forth the present address of the plaintiff.

40. Set forth the date of birth of the plaintiff.

41. Identify each and every law, statute, ordinance, ergulation or rule it is claimed the defendant Mathews and Chase violated.

42. Identify each and every law, statutes, ordinance, regulation or rule it is claimed the defendant Mathews gineering violated.

43. Identify each and every law, statute, ordinance, regulation or rule it is claimed the defendant The Westlectric Castings Company violated.

44. Identify each and every law, statute, ordinance regulation or rule it is claimed the defendant Banner Industries, Inc. The Fate-Root-Heath Division violated.

45. Identify each and every law, statute, ordinance, regulation or rule it is claimed the defendant The Card Corporation violated.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

46. Identify each and every law, statute, ordinance, regulation or rule it is claimed the defendant The Metalloy Steel Foundry Co. violated.

Dated: New York, New York
August 26, 1974

Yours, etc.

To:

Corcoran and Brady
Attorneys for plaintiff
11 Park Place
New York, New York 10007

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Demand Pursuant to CPLR §2103(e) (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

SIRS:

Please Take Notice that Kroll, Edelman, Elser & Wilson, attorneys for Mathews and Chase, a partnership, hereby demands pursuant to CPLR §2103(e), a list of those parties who have appeared in this action, together with their post office addresses, and names and post office addresses of the attorneys who have appeared on their behalf.

Dated: New York, New York
August 26, 1974

Yours etc.,

KROLL, EDELMAN, ELSER & WILSON
Attorneys for Matthews & Chase a co-partnership
Office & P. O. Address
22 East 40th Street
New York, N. Y. 10016

To:

Corcoran and Brady
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Notice to Take Deposition (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFEILD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc., THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

SIR

Please Take Notice, that pursuant to Article 31 of the Civil Practice Law and Rules the testimony, upon oral examination, of plaintiff as an adverse party will be taken before a Notary Public of the State of New York who is not an attorney, or employee of an attorney, for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of interest or because of consanguinity or affinity to any party herein, at the offices of Hart & Hume, 10 East 40th Street, New York, New York (30th Floor) on the 11th day of September 1974 at ten o'clock in the forenoon of that day with respect to evidence material and necessary in the defense of this action:

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

All of the relevant facts and circumstances in connection with the accident which occurred on the 13th day of September 1974 at the excavation site of the 79th Street and Riverside Drive tunnel, including negligence, contributory negligence, liability and damages.

That the said person to be examined is required to produce at such examination the following: all books, reports, papers, medical bills, records, correspondence concerning the issues in this action.

Dated, New York, New York
August 27, 1974

Yours, etc.,

HART & HUME
Attorneys for Defendant
Mathews and Chase
Office and Post Office Address
10 East 40th Street
New York, New York 10016
Tel.: (212) 686-0920

To

Corcoran and Brady, Esqs.
Attorneys for Plaintiff
11 Park Place
New York, New York 10007

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick—Verified Bill of Particulars (Bronx County Action).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF BRONX.

SAMUEL CHANEYFIELD,

Plaintiff,

against

MORAN ENGINEERING CO., MATHEWS AND CHASE, THE WESTLECTRIC CASTINGS COMPANY, BANNER INDUSTRIES, Inc. THE FATE-ROOT-HEATH DIVISION, THE CARD CORPORATION, THE METALLOY STEEL FOUNDRY CO., Inc.,

Defendants.

Index #14194/1974

The Plaintiff, by Corcoran and Brady, Esqs., for his verified Bill of Particulars, alleges as follows:

1. The accident occurred on September 13, 1971 at about 10 P.M.

2. The accident occurred in the tunnel being excavated by the Plaintiffs Employer Perini, Brown & Root, Gordon Ball, a Joint Venture, at or near the shaft located at West 79th Street and Riverside Drive in the Borough of Manhattan, City and State of New York.

3. Immediately prior to the accident, the Plaintiff was operating a Plymouth Diesel locomotive attached to which locomotive were ten muck cars loaded with muck and rock, towards the shaft at West 79th Street and Riverside Drive, New York, New York.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

4. The accident was caused when the steel coupler attached to the rear of the muck car immediately behind the locomotive disengaged causing the nine muck cars to be separated from the train being pulled by the locomotive being operated by the Plaintiff.

5. Actual and constructive notice of the defective and improperly designed coupler is claimed.

6. Actual notice was given to the management of the employer, namely, the Perini, Brown & Root, Gordon Ball, a Joint Venture, periodically and later on a daily basis; Actual notice was given to The City of New York Inspectors and representatives of other defendants through vehicle of the employer.

7. Constructive notice of the defective condition and improperly designed and manufactured coupling is claimed to have existed from a period of time in the area of the shaft at West 79th and Riverside Drive, New York, N. Y. shortly after the tunnel excavation was commenced or approximately six months or more prior to the happening of the accident.

8. The actual omissions constituting the negligence and carelessness claimed with respect to the Defendant Mathews and Chase is as follows:

(a) The Defendant Mathews and Chase failed and neglected to inspect and examine the couplers used in connection with the coupling of the muck cars to the locomotive.

(b) The Defendant Mathews and Chase was negligent under its duties as a supervising contractor for and on behalf of the City of New York to check out the foreseeability of the disengagement of the male and female parts of the coupling.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

(c) The Defendant Mathews and Chase were negligent under the duties imposed upon them by their contract with the City of New York to test the hazards associated with the "Can't Miss Coupler" under working conditions, particularly when the muck cars, while loaded, were being pulled or drawn by a locomotive.

(d) The Defendant Mathews and Chase were negligent in failing to bring to the attention of the Plaintiff and/or his employer the possibility and likelihood of the "V" shaped wedge or dog being inserted in the opening in a reverse position.

(e) The Defendant Mathews and Chase were negligent in failing to inform the Plaintiff and/or his employer of the likelihood of disengagement of the male and female parts of the coupler in the event the rivet or bolt was not inserted in the "V" shaped wedge or dog.

(f) The Defendant Mathews and Chase were negligent in their duties as supervisor or under their duties of a contract between them and the City of New York to reject the "V" shaped wedge or dog as a means of connecting the mail and female part of the coupling in that said "V" shaped wedge or dog had a tendency to project itself upwards during the movement of the train of cars being pulled by the locomotive especially on inclines and curves of the trackage on which the locomotive and muck cars travel.

(g) The Defendant Mathews and Chase was negligent and careless in failing to communicate with the Defendants Moran Engineering Co. and/or The Westlectric Castings Company, and/or Banner Industries, Inc., the Fate-Root-Heath Division, and/or The Card Corporation and/or The Metalloy Steel Foundry Co., Inc. or The City of New York, of the fact that the "V" shaped wedge and the "Can't Miss Coupler" was improperly designed and inherently dangerous.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

(h) The Defendant Mathews and Chase was negligent in failing to make an inspection of the work conditions under which the "Can't Miss Coupler" and its parts, namely the wedge and bolt, would not be used by the workmen excavating the tunnel or would be improperly used by said workmen during the working conditions under which the Plaintiff and others employed in the tunnel work.

(i) The Defendant Mathews and Chase was negligent and careless in failing to insist that the muck cars that were coupled by means of the "Can't Miss Coupler" be supplemented by a cable or chain in the event the muck cars would be separated one from another or from the locomotive during their operations, because of defectively dsigned coupler.

9, 10, 11, 12, 13. The Defendants Moran Engineering Company, The Westlectric Castings Company, the Banner Industries, Inc., The Fate-Root-Heath Division, The Card Corporation and The Metalloy Steel Foundry Co., Inc. and each of them was negligent in furnishing, delivering, selling, designing, fabricating, manufacturing a steel coupler consisting of a male and female part held together by a "V" shaped wedge which "V" shaped wedge could be placed into the slot in a reverse position without the knowledge of the workmen doing the act of coupling said cars; the Defendants aforesaid and each of them were negligent in failing to design, fabricate, manufacture, sell, deliver and furnish a coupler which would "couple" automatically upon contact; the Defendants and each of them aforesaid were negligent in failing to warn the Plaintiff and other workmen engaged in the tunnel excavation at or near the shaft at West 79th Street and Riverside Drive, New York, N. Y. of the possibility that said coupling would disengage and separate by reason of the movement and jouncing of the

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

muck cars and locomotive while they travelled from the heading where the muck cars were loaded to the shaft where the muck cars would be unloaded, which movement, pushing, pulling and jouncing action would cause the "V" shaped wedge or dog to project itself upwards and cause a separation of the muck cars and/or the muck cars from the locomotive.

14. The Plaintiff will claim that the design, manufacture, casting, forging, selling, distribution and delivery of the "Can't Miss Coupler" by the Defendants and each of them, was negligent in that the steel "V" shape wedge was designed and manufactured in such a manner that the same could be inserted in a reverse position, particularly when the horizontal rivet or bolt to hold the "V" shaped wedge in place was not inserted by the person coupling the said muck cars or locomotive; the Plaintiff will claim that the Defendants and each of them failed to identify by a marking or color or other sign to warn and alert the workmen as to the proper manner of inserting the "V" shape wedge into the slot of the coupling; the Plaintiff will claim that the Defendants and each of them were negligent in the design and manufacture of a coupling which required the insertion of two separate and distinct components, namely, the "V" shaped wedge and the steel rivet or bolt in order to couple two muck cars or a muck car to a locomotive; the Plaintiff will claim that the design and manufacture of the coupling in question was hazardous in that the operation of "coupling" required the physical handiwork of the workmen instead of designing and manufacturing a coupling which would cause the two parts of the coupling to engage automatically upon contact; the Plaintiff will claim that the Defendants and each of them failed to take reasonable precautions to check and test the workings of the couplings

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

in actual practice, having in mind the pressures, smoke, sounds, darkness that obtained in a tunnel underground where insufficient lighting, blasting, drilling and similar operations would cause the workmen charged with the coupling of the car to be distracted; the Plaintiff will claim that the Defendants and each of them were negligent in designing, manufacturing, casting, forging, selling or distributing a muck car coupler whose component parts were easily confused and reversed in position and which required several operations to be completed before said coupling was reasonably free of hazard and defectiveness; the Plaintiff will claim that the Defendants and each of them was negligent in failing to foresee the likelihood and possibility of workmen under the stress and strain as outlined above to be able to comply with and utilize the component parts and operations in order to effect a "coupling" that was reasonably free from hazard or defect; with respect to the Defendant Mathews and Chase, the Plaintiff will claim that this Defendant was negligent and careless in failing to oversee the various factors of stress and strain of ordinary workings in the tunnel including drilling, blasting, sound, smoke, aroma, improper lighting and other factors of day-to-day tunnel operations which the firm of Mathews and Chase as Consulting Engineers knew or should have known obtain in the day-to-day working of tunnel excavation and construction.

15. The Plaintiff will claim that the Defendant Moran Engineering Co. designed and manufactured, sold, distributed and delivered the muck car used in the tunnel operations; that the Westlectric Castings Company, The Card Corporation and The Metalloy Steel Foundry Co., Inc. cast or forged the steel couplings for the use on the muck cars manufactured by the Moran Engineering Co.; the Plaintiff will claim that The Card Corporation

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

was negligent in failing to supervise the design and manufacture of the pattern of the "Can't Miss Coupler" which was made for The Card Corporation by the American Pattern Works, Inc. of Denver, Colorado.

16. See answers to 9, 10, 11, 12, 13 above.

17. The Plaintiff will claim that the Westlectric Castings Company, The Card Corporation and The Metalloy Steel Foundry Co., Inc. were negligent in the designing and manufacturing of the inherently dangerous appliances alleged in the complaint; it will be claimed that the Moran Engineering Co. and the Banner Industries, Inc., The Fate-Root-Heath Division purchased and incorporated into the muck car the "Can't Miss Coupler" designed and manufactured by the remaining Defendants other than the Defendant Mathews and Chase.

18. The "V" shaped wedge or dog was negligently designed in that the "V" shaped wedge or dog could be inserted in the slot in a reverse position without the conscious knowledge of the workmen who inserted the same; the "V" shape wedge or dog was negligently designed in that the shape of the wedge in the form of a "V" permitted the wedge or dog to project upwardly particularly when the muck cars were being pushed by the locomotive; also when the muck cars while loaded were being pulled by the locomotive and again when the muck cars were travelling at inclines or curves on the trackage in the tunnel; the "V" shape wedge or dog was of an improper design in that it required the insertion of a horizontal bolt or rivet to hold the "V" shaped wedge or dog in place, provided the "V" shaped wedge or dog was inserted properly in the first place.

19. The Plaintiff will claim that the Defendants and each of them were negligent in failing to foresee that the "V" shaped wedge or dog by reason of its latent improper design would cause the coupler to disengage.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

20. The Plaintiff will claim that the Defendants were negligent in designing, manufacturing and selling a coupler which required two or more separate independent operations to hold a coupling in place; further, it required an insertion of a rivet or bolt to hold the "V" shaped wedge or dog in place; the Plaintiff will claim that the Defendants and each of them other than the Defendant Mathews and Chase were negligent in failing to design and furnish a coupler that would engage immediately on impact rather than by separate independent actions required of the workmen.

21. The Plaintiff will claim that each of the Defendants other than the Defendant Mathews and Chase were negligent in designing, manufacturing and selling the aforementioned coupler or by failure to correct and remedy the defective design aforesaid and permitted its use; it will also be claimed that each of the Defendants other than the Defendants Mathew and Chase and Banner Industries, Inc. The Fate-Root-Heath Division, jointly and separately designed and manufactured the said defective coupler in question.

22. The Plaintiff will claim that each of the Defendants were negligent in failing to perform appropriate tests to inform the Plaintiff of the latent, inherent danger and hazard in the coupler.

23. Refer to Paragraph

24. The latent, inherent danger and hazard in the coupler consisted in the fact that the "V" shaped wedge or dog could be inserted in one or two positions; if inserted in a reverse position it was impossible to insert the rivet or bolt into the wedge; the latent inherent danger of the coupler is represented by the fact that upon its face,

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

the workmen were unable to distinguish whether the wedge was placed in the slot correctly or in a reverse position, particularly under the distracting conditions outlined above while working in the tunnel.

25. It will be claimed that each of the Defendants failed to attach warnings to alert workmen in coupling cars of the danger of inserting the wedge in the slot in a reverse position or without inserting a rivet or bolt to hold the wedge in place.

26. See Paragraph

27. The danger in inserting the wedge in the slot in a reverse position would prevent the workmen from inserting the rivet or bolt; the danger of failing to insert the rivet or bolt into the wedge would permit the wedge to slip upwards out of the slot and cause the cars to be disengaged.

28. The failure to attach a chain or cable to the coupler will be charged against each of the Defendants.

29. The failure to inspect the coupler and its component parts in actual operation will be charged against the Defendants and each of them separately and independently; the failure to make such inspections and tests of the component parts while in actual operation constitutes the act, error and omission claimed.

30. It will be claimed that the Defendants and each of them failed to inspect the coupler and component parts in actual operation.

31. A statement of the injuries claimed by the Defendant are as follows: Plaintiff suffered a compound and comminuted fracture of the distal left humerus; the entire neurovascular bundle was exposed secondary to

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

the accident; the Plaintiff underwent debridement at Roosevelt Hospital and serial closures until a large, gaping, open wound was closed medially; the Plaintiff suffered a burn which involved portions of his upper extremity and was required to have his left arm held together by a Kirschner in the Olecranon and a long arm cast which was removed approximately ten weeks post fracture and then placed in a Melrose sling; the Plaintiff suffered considerable loss of tissue, both anteriorly and posteriorly with severe injury to this region; the Plaintiff has a permanent restriction of the left arm and shoulder with a range of motion from zero to 120 degrees of abduction; at the elbow the Plaintiff has 100 degrees of flexion; the Plaintiff has loss of the flexor extensor groups of the elbow with a loss of muscle strength; the Plaintiff has suffered a definite and permanent loss of a good portion of his biceps Brachialis muscle and triceps muscle group as well as considerable injury to the surrounding soft tissues and bone; the Plaintiff has suffered a delay in healing of the humerus and the Plaintiff was otherwise injured in his head, body and limbs and suffered severe shock to the nervous system and to the brain, accompanied by headaches and was otherwise rendered sick, sore, lame and disabled and the Plaintiff is informed and verily believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience.

32. The Plaintiff was confined to the hospital for six (6) weeks; the Plaintiff was confined to his bed and to his home continually for six (6) weeks except for visits to the doctor.

33. The Plaintiff was totally disabled for twelve (12) weeks.

34. The Plaintiff was partially disabled for three years to date.

Exhibit B, Continued, Annexed to Affidavit of Marshal S. Endick

35. Plaintiff was incapacitated from regular employment in the first stage for a period of twelve (12) weeks. He returned to light duty for a period of two weeks and thereafter was incapacitated from his regular employment for an additional five (5) weeks.

36. Special damages claimed are as follows:

(a) Hospital Expense (Roosevelt Hospital)	$6,883.25
(b) Physician's Services Dr. James C. Parkes II	596.90
(c) Ambulance	56.00
(d) Medical Supplies Approx.	100.00
(e) Loss of Earnings—based upon a weekly salary of $525 over a period of 17 weeks	$8,925.00

37. The name of the Plaintiff's employer is the Perini, Brown & Root, Gordon Ball, a Joint Venture, 437 Madison Avenue, New York, N. Y.

38. Not applicable.

39. The present address of the Plaintiff during his work week is 1173 East 229th Drive North, Bronx, New York 10466.

40. The Plaintiff was born on August 22, 1921.

41, 42, 43, 44, 45, 46. The Defendants and each of them including the Defendants Mathews and Chase, The Westlectric Castings Company, Banner Industries, Inc., The Fate-Root-Heath Division, The Card Corporation, Moran Engineering Co., and The Metalloy Steel Foundry Co., Inc. violated Section 200, 240, 241 of the New York State Labor Law; violated Code Rule 23 of the Rules of the New York State Board of Standards and Appeals, Rule 23.3 (b) (d) (n) 2 (T) 6 (cc), 23, 42 (a)(1), Code Rule

22.20, Code Rule 31.3 (d)(g)(h) (3) 31.5 Rule 31.17, Rule 30.3 (a) (c) (d) (g) (h) (p) Rule 30.16-7, Code Rule 17.19 (4) (5) (6). The Defendants and each of them violated the Federal Metal and Non-Metallic Mine Safety Act, Title 30, U. S. Code, Section 721 *et seq.*

Dated: New York, N. Y.
Sept. 10, 1974

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, New York 10007
Tel: (212) 227-2242

To:

Hart & Hume, Esqs.
Attorneys for Defendant
Mathews and Chase
10 East 40th Street
New York, N. Y. 10016

Exhibit C, Annexed to Affidavit of Sidney Prival—Statement of Earnings of Sidney Prival.

(See opposite page.) ☞

CRS DESIGN OF NEW YORK, INC.
A. A. MATHEWS DIVISION
230 PARK AVENUE NEW YORK, N. Y. 10017

CONTROL NUMBER 000180 1-2/210

EMP. NO.	DEPT.	MO.	DAY	YR.	CHECK NO.
8005	0001	09	23	74	0180

DOLLARS	CENTS
$415	43

PAY TO THE ORDER OF S PRIVAL

PAYROLL

THE CHASE MANHATTAN BANK
National Association
Madison Avenue at 45th Street, N. Y., N. Y. 10017

Randall W. Warren
S A Pennington

⑆0210⑈00021⑆ 033⑈1⑈06127 5⑈

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	OTHER STATE TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
09 20 74	8005	0001	2 WKS	17484	5694	21510	73716	367728

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0348	7.661

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY		SDI	CITY	NET PAY
NYC 2865		3585	12286			60	949	41543

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	OTHER STATE TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
09 06 74	8005	0001	2 WKS	14619	4745	17925	61430	306440

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0348	7.661

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY		SDI	CITY	NET PAY
NYC 2865		3585	12286			60	949	41543

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	CITY OR LOCAL TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
07 12 74	8005	0001	2 WKS	3012	949	3585	12286	61288

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0348	7.661

DEDUCTIONS

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY	SDI	CITY	NET PAY
NYC 3012		3585	12286		60	949	41396

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	CITY OR LOCAL TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
07 26 74	8005	0001	2 WKS	6024	1898	7170	24572	122576

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0349	7.661

DEDUCTIONS

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY	SDI	CITY	NET PAY
NYC 3012		3585	12286		60	949	41396

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	CITY OR LOCAL TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
08 09 74	8005	0001	2 WKS	8889	2847	10755	36858	183864

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0348	7.661

DEDUCTIONS

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY	SDI	CITY	NET PAY
NYC 2865		3585	12286		60	949	41543

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

PAY PERIOD ENDING	EMP. NO.	DEPT.	PAY PERIOD LENGTH	STATE TAX	CITY OR LOCAL TAXES	F.I.C.A.	FED. INC. TAX	TOTAL EARNINGS
08 23 74	8005	0001	2 WKS	11754	3796	14340	49144	245152

NAME	REG. HRS.	1½ HOURS	DBL. TIME HRS.	XXXX	REG. PAY	O. T. PAY	OTHER PAY
S PRIVAL	8000				61288		

VAC. PAY	GROSS PAY	SOCIAL SEC.	RATE
	61288	112-18-0348	7.661

DEDUCTIONS

STATE TAX	OTHER STATE TAXES	F. I. C. A.	FED. INC. TAX	VAC. PAY	SDI	CITY	NET PAY
NYC 2865		3585	12286		60	949	41543

STATEMENT OF EARNINGS AND DEDUCTIONS
DETACH AND RETAIN FOR YOUR RECORDS

CRS DESIGN OF NEW YORK, INC. • A. A. MATHEWS DIVISION • 230 PARK AVENUE • NEW YORK, N. Y. 10017

Affidavit of William J. Corcoran in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL CHANEYFIELD,

Plaintiff,

against

THE CITY OF NEW YORK and MATHEWS AND CHASE,

Defendants.

Civ. Action
74 Civ. 3845 (R.O.)

State of New York,
County of New York, ss:

WILLIAM J. CORCORAN, being duly sworn, deposes and says:

1. He is a member of the firm of Corcoran and Brady, Attorneys for the Plaintiff in the above entitled action and is a member of the bar of this Court.

2. This affidavit, along with the accompanying Memorandum of Law, are submitted in opposition to the Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

3. The moving party raises three points for consideration by this Court:

(a) Service of summons upon the Defendant Mathews and Chase was invalid by reason of the claim that Sidney Prival upon whom the United States Marshal served the summons on September 10, 974 was not an employee or managing or general agent of the Defendant Mathews and Chase. The latter is a partnership with

its main office at 230 Park Avenue, Borough of Manhattan, City and State of New York and were engaged as consulting engineers by the Defendant The City of New York in the construction of a large tunnel or mine from West 50th Street to the George Washington Bridge. This tunnel is being blasted out of solid rock known as "Manhattan Schist". The job has been in progress for over two years and may not be completed for another year or so;

(b) Lack of jurisdiction of the subject matter. The Defendant Mathews & Chase contend that the Federal Metal and Non-Metallic Mine Safety Act does not apply to a job of this type;

(c) That a similar action is pending in the Supreme Court, Bronx County wherein the Defendant Mathews & Chase is named as a party defendant.

4. The argument of the moving party to the effect that service upon Sidney Prival was not personal service upon the partnership should be dismissed out of hand for the reason that the individual partners, Messrs. Mathews and Chase were each served personally by the United States Marshal in the States of California and Maryland as evidenced by the exhibits attached to the Memorandum of Law. On the other hand, the Memorandum of Law sufficiently established that Sidney Prival was a person of sufficient connection with the partnership to receive the service of process. As pointed out in the Memorandum of Law "generally service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive the service". 2 Moore Fed. Practice, 2nd Ed., page 963 and other authorities listed in the Memorandum of Law.

5. This Court, per Judges Dimock and Dawson of fond memory, each held that service of process upon a station agent was sufficient service upon the Erie Railroad and

the New York and New Jersey Railroad in authorities referred to in the Memorandum of Law. Similarly, the Court has held that service of summons on the coach of a football team is sufficient and valid service on the Defendant National Football League. In the latter instance, none of the persons served had a financial interest in the defendant corporation or business and have no policy-making authority. The rule appears to be from the decided cases, that service upon a representative so integrated with the organization that he will know what to do with the papers is sufficient. Mr. Prival, upon whom the summons was served is an executive whose earnings based upon the documents attached to the moving papers puts him in the bracket of $100,000 per year or close to it. Furthermore, the moving party fails to inform this Court if Mr. Prival had been an employee or executive of the partnership before going to CRS Design of New York, Inc., Division of A. A. Mathews. The only intimation on the background of Mr. Prival is that he became an employee of this latter firm as of July 1, 1974. However, service upon Mathews and Chase individually is adequate to cure any infirmity, if any, referrable to the service upon Mr. Prival.

Federal Metal and Non-Metallic Mine Safety Act applies

6. The work being performed on the project undertaken by the City of New York represents work embraced in the statute entitled "Federal Metal and Non-Metallic Mine Safety Act" in every detail. The hearings before the Congressional Committees which recommended this legislation were concerned with accidents and occupational diseases to which workers in underground mining or tunnelling were subjected to. Senator Javits of New York and the late Adam Clayton Powell were the principal proponents of this bill which had for its purpose the tightening up of controls on underground mining and

tunnelling which had caused so great a loss of life and disability due to accidents and occupational diseases such as silicosis and astesosis, which are now fully recognized by the Court and the Workmen's Compensation Boards throughout the country.

The committees of the Senate and the House were primarily interested in protecting the worker from the many perils that beset him in his day to day work underground. Congress was not concerned with any particular type of mine, whether for the removal of precious metals or stones, such as gold, silver, copper or diamonds, rubies and the like; further Congress, having already taken care of the problems affecting coal mining, had passed a law covering the mining of that particular commodity, whether it be bituminous or anthracite coal or other forms of lignite.

The Federal Metal and Non-Metallic Mine Safety Act took in all other types of deposits when it referred to the removal of minerals. It did not describe the mineral in detail, such as whether it was precious or non-precious —it merely said "mineral". This, of course, could include sand and gravel, as the committee refers to this commodity or it could include limestone, granite, Westchester stone, or what is common in the Borough of Manhattan, a rock known as Manhattan Schist. The latter stone is a mineral having particular qualities adaptable to particular circumstances.

The proof will show that this Manhattan Schist was mined by drilling and blasting with dynamite and removed by truck from New York to New Jersey on a daily basis at a profit for the big Sports Complex in New Jersey where the new stadium for the New York Football Giants will be housed. This constituted commerce within the meaning of the Act, and represented a "business" in the sense that the mineral extracted from the natural deposits several hundred feet below street level was sold at a profit. It is of no moment that the

mineral is not salt, asbestos, limestone, granite, gold, silver or copper. Manhattan Schist is as much a mineral as any of the aforementioned. The chief objective Congress sought to correct for the man in a tunnel or mine, other than coal mines, was the perils this type of work involved. Safety and only safety was the prime basis for the Congressional hearings and the legislation recommended to the Congress.

The action in the Supreme Court, Bronx County is no Bar to the Action in the Federal Court

7. In the action pending in the Supreme Court, Bronx County, several defendants are named along with the defendant Mathews & Chase in a product liability case, pertaining to the improper design and manufacture of the "Can't Miss Coupler" which caused the nine loaded muck cars to break away from the Diesel locomotive being operated by the Plaintiff and bring about the serious injuries when he was thrown from the cab of the Locomotive and projected under the wheels of the muck car attached thereto, when it was struck by the free-wheeling muck cars which had broken away.

In the Federal Court case, recovery is sought against the owner and general contractor of this tunnel or mine, namely The City of New York, in failing in its duty to the Plaintiff to provide him with a safe place to work. This duty is imposed on an owner and general contractor under the provisions of the Act in question as well as under the New York State Labor Law, Section 241. In the Supreme Court action, the City of New York is not named as a defendant. However, its supervising agency, Mathews & Chase is named for its failure to inspect and provide against the use of inherently dangerous instrumentalities such as the defectively designed coupler, which

had been the cause of numerous accidents and mishaps during the life of the tunnel, from its inception. It is of no concern by way of prejudice to the defendant, Mathews & Chase that it is being sued in two tribunals under two different theories of liability. The recovery, if successful in the one, will off-set the recovery in the other so that the defendant will not be subject to a double payment. In any event the only relief sought by the moving party in this regard is a stay of the action, rather than a dismissal, insofar as the point it makes as to being subject to suit in two tribunals.

WHEREFORE, it is respectfully requested that the Motion of the Defendants Mathews & Chase for an order dismissing the within action, quashing the return of service of the summons, or staying the action, be denied in all respects.

(Sworn to by William J. Corcoran, February 19, 1975.)

Memorandum Decision and Order by Owen, D. J.

Since the operation in which plaintiff was working was not a mine within the Federal Metal and Non-Metallic Mine Safety Act, 30 U. S. C. §721 *et seq.;* since that act does not provide for a private right of action by one injured; and since Mathews & Chase are not mine operators within the act, there is no Federal jurisdiction and the motion to dismiss is granted.*

So Ordered

s/ RICHARD OWEN
U. S. D. J.

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*On my own motion, pursuant to Rule 12 (b) (3) F.R.C.P. the action is dismissed as to the City of New York as well as on the ground that there is no subject matter jurisdiction.

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL CHANEYFIELD

against

THE CITY OF NEW YORK and MATHEWS and CHASE.

74 Civil 3845 (RO)

The defendants Mathews and Chase having moved the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the complaint for lack of jurisdiction and a cause of action not stated inasmuch as the alleged claim does not arise under the Federal Metal and Non-Metallic Mine Safety Act, and the said motion having come to be heard before the Honorable Richard Owen, United States District Judge, and the Court thereafter on February 25, 1975, having handed down its memorandum granting the said motion and the Court in its own motion further, dismissed the action against The City of New York, for lack of jurisdiction, it is,

ORDERED, ADJUDGED and DECREED: that defendants The City of New York and Mathews and Chase, have judgment against the plaintiff Samuel Chaneyfield, dismissing the complaint.

Dated: New York, N. Y.
February 26, 1975.

RAYMOND F. BURGHARDT
Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL CHANEYFIELD,

Plaintiff,

against

THE CITY OF NEW YORK and MATHEWS & CHASE,

Defendants.

74 Civ. 3845
(RO)

Notice is hereby given that Samuel Chaneyfield the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dated February 26, 1975 and entered in this action on February 27, 1975 dismissing the Complaint against the Defendant The City of New York and the Defendant Mathews and Chase, for lack of jurisdiction and for a cause of action not stated on the ground that the same does not arise under the Federal Metal and Non-Metallic Mine Safety Act, and the Plaintiff appeals from said judgment and each and every part thereof.

Dated: New York, New York
March 10, 1975

CORCORAN & BRADY
Attorneys for the Plaintiff
11 Park Place
New York, New York 10007
Tel: (212) 227-2242
By WILLIAM J. CORCORAN
A Member of the Firm

Notice of Appeal

To:

Clerk, United States District Court
Southern District of New York
Foley Square
New York, N. Y.

Kroll, Edelman, Elser & Wilson Esqs.
Attorneys for Defendant
Mathews & Chase
22 East 40th Street
New York, N. Y. 10016
Tel: (212) MU 6-2686

J. Robert Morris, Esq.
Attorney for Def. The City of New York
111 Fulton Street
New York, N. Y. 10038

Motion for Reargument Pursuant to Rule 9(m) of the General Rules.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIR:

Please Take Notice, that upon the annexed affidavit of William J. Corcoran, duly sworn to the 11th day of March, 1975, the Memorandum of Law submitted in connection therewith, and upon all of the proceedings heretofore had herein, on the 26th day of March, 1975, at 10:00 o'clock in the forenoon of that day, the undersigned attorneys for the plaintiff, Samuel Chaneyfield, will move before Judge Richard Owen sitting in Chambers at the United States District Court for the Southern District of New York, Foley Square, New York, New York, for the following relief:

1. An Order granting this motion for reargument, pursuant to Rule 9(m) of the General Rules of this Court.*

2. Upon the granting of the motion for reargument that the decision of this Court, rendered on February 21, 1975, dismissing the cause of action as against the defendants, Mathews & Chase, and upon the Court's own motion, dismissing the cause of action against the defendant The City of New York upon the grounds that the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. §721 *et seq.* does not apply to the operations in which the plaintiff was working; and further, that such Act does not provide for a private right of action by one injured; and further, on the ground that the defendant, Mathews & Chase, are not mine operations within the meaning of the Act; and that there is no Federal

*The Court, per Peter Block, extended time to 3/12/75.

jurisdiction, be recalled, and that thereupon the said motion of the defendant, Mathews & Chase, and the Court's own motion to dismiss the complaint, be denied.

Dated: New York, New York
March 11, 1975

Yours, etc.

CORCORAN AND BRADY
Attorneys for Plaintiff
By WILLIAM J. CORCORAN
A Member of the Firm
11 Park Place
New York, New York
Telephone No. (212) 227-2242

To:

Clerk, United States District Court
Southern District of New York
Foley Square
New York, New York

Kroll, Edelman, Elser & Wilson, Esqs.
Attorneys for Defendant Mathews & Chase
22 East 40th Street
New York, New York 10016

J. Robert Morris, Esq.
Attorney for Deft. The City of New York
111 Fulton Street
New York, New York 10038

Affidavit of William J. Corcoran in Support of Motion for Reargument.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

WILLIAM J. CORCORAN, being duly sworn, deposes and says:

1. I am a member of the firm of Corcoran and Brady, attorneys for the plaintiff in the above-entitled action, and am familiar with the facts herein.

2. An application for reargument of the motion heard before this Court on the 21st day of February, 1975 is sought on the ground that this Honorable Court has misconstrued the meaning and intent of the Congress in enacting the Federal Metal and Non-Metallic Mine Safety Act, 30, U.S.C. §721 *et seq.* Parenthetically, the Court misconstrued the purposes for which Congress enacted the Act, aforesaid, by confusing the ultimate object of the underground work in progress and believing the underground facility to be an "intercepting sewer" rather than a "mine". This misconception is readily understandable when one conceives of a mine as being an underground facility from which is extracted a precious or non-precious metal or mineral, and nothing more.

3. In the event the Court adheres to its original decision that the Federal Metal and Non-Metallic Mine Safety Act is not applicable to the within case, then, and in that event, the attorneys for the plaintiff begs leave of the Court to amend the complaint so as to base jurisdiction on the Federal Employees Liability Act, 45 U.S.C., Section 51 *et seq.*

4. Such other and further relief as to this Court may seem just ar oper.

(Sworn to by William J. Corcoran, March 11, 1975.)

To:

Clerk, United States District Court
Southern District of New York
Foley Square
New York, New York

Kroll, Edelman, Elser & Wilson, Esqs.
Attorneys for Defendant Mathews & Chase
22 East 40th Street
New York, New York 10016

J. Robert Morris, Esq.
Attorney for Deft. The City of New York
111 Fulton Street
New York, New York 10038

Memorandum of Judge Owen.

The motion for reargument is denied.

So Ordered

3/21/75
Filed 3/26/75

/s/ RICHARD OWEN
U. S. D. J.

Amended Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Notice is hereby given that Samuel Chaneyfield, the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dated February 26, 1975 and ıtered in this action on February 27, 1975 dismissing the Complaint against the Defendant The City of New York and the Defendant Mathews and Chase, for lack of jurisdiction and for a cause of action not stated on the ground that the same does not arise under the Federal Metal and Non-Metallic Mine Safety Act, and the Plaintiff appeals from the Memorandum Order dated March 21, 1975 and filed March 26, 1975 of Judge Richard Owen, denying the Motion for Reargument of the Motion to Dismiss the Complaint and the Plaintiff appeals from said Orders and each and every part thereof.

Dated: New York, N. Y.
April 18, 1975

CORCORAN AND BRADY
Attorneys for Plaintiff
11 Park Place
New York, New York 10007
Tel: (212) 227-2242
By WILLIAM J. CORCORAN
A Member of the Firm

Amended Notice of Appeal

To:

Clerk, United States District Court
Southern District of New York
Foley Square
New York, New York

Kroll, Edelman, Elser & Wilson, Esqs.
Attorneys for Defendant
Mathews & Chase
22 East 40th Street
New York, N. Y. 10016
Tel: (212) MU 6-2686

J. Robert Morris, Esq.
Attorney for Def. The City of New York
111 Fulton Street
New York, N. Y. 10038

375—Affidavit of Service United States Court of Appeals
for the Second Circuit

Printer Co., Inc., 11 Park Place, New York, N. Y. 10007

Samuel Chaneyfield
Plaintiff-Appellant

against

The City of New York and Matthews & Chase
Defendants-Appellees

On Appeal from Tye United States District Court
for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Corcoran & Brady Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 1st. day of May 19 75 at 22 East 40th. Street New York, New York he served the annexed Appendix upon Kroll, Edelman, Elser & Wilson Esqs. in this action, by delivering to and leaving with said attorneys 2 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 1st.
day of May 19 75

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 77